SUPREME COURT, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DEBRA McMASTERS, individually and as next-of-kin of decedent, AMANDA LEE SCOTT, a minor,

Petitioner,

v.

UNITED STATES OF AMERICA, and the DEPARTMENT OF THE NAVY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *Van Dusen* rule — that the law of the transferor court applies after a transfer pursuant to 28 U.S.C. § 1404(a) — applies to federal law claims in the same manner as it does with respect to federal diversity claims.

2. Whether, under the law of the case doctrine, the transferee court may review and reverse a pre-transfer order, decided by the transferor court in accordance with the law of the transferor forum, by applying the law of the transferee forum following a transfer pursuant to 28 U.S.C. § 1404(a).

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Debra McMasters, individually and as next-of-kin of decedent, Amanda Lee Scott, a minor, Petitioner, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The District Court's opinion granting Respondents' motion for judgment on the pleadings is published at 2000 WL 336549. (Appendix ("Pet. App.") 15a-26a) The District Court's opinion denying the Petitioner's motion to reconsider is otherwise not published. (Pet. App. 11a-14a) The Seventh Circuit Court of Appeals' opinion affirming the District Court's opinion is published at 260 F.3d 814 (7th Cir. 2001). (Pet. App. 1a-10a) The Seventh Circuit Court of Appeals' order denying rehearing and rehearing *en banc* is not otherwise published. (Pet. App. 28a-29a)

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals entered its opinion and order on August 14, 2001, and denied rehearing and rehearing *en banc* on November 2, 2001. Justice Stevens subsequently extended the time to file this petition for a writ of certiorari to and including March 1, 2002. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

A. General Background.

The Plaintiff, Debra McMasters ("McMasters"), is the mother of the decedent Amanda Lee Scott, who was fifteen years old at the time she was raped and murdered by then-United States Marine Valentine Underwood ("Underwood"). On December 19, 1997, a jury in the Victorville Superior Court of California convicted Underwood on six counts, including premeditated first-degree murder, for the crimes he committed against the Plaintiff's decedent. The United States of America is named as a Defendant in this matter as a result of the actions and omissions of the United States Department of the Navy, and more specifically the United States Marine Corps. McMasters alleges that she is entitled to relief under the Federal Torts Claims Act ("FTCA"), 28 U.S.C. §§ 2671, *et seq.*, because the Marine Corps negligently recruited, enlisted, supervised, and retained Underwood.

B. Underwood's Criminal Background.

Prior to his enlistment in the United States Marine Corps, Underwood attended Lubbock Christian University. The University maintained a file on Underwood, which cited numerous instances where Underwood was the subject of complaints ranging from sexual harassment, sexual assault, physical assault and several other related/similar offenses, including suspected narcotics use and trafficking. On July 2, 1987, Underwood was arrested and charged in Montgomery County, Maryland for the rape and assault of Flora Castells. The Montgomery County Police Report indicates that Underwood "did engage in vaginal intercourse with Flora

Castells, without the victim's consent and did suffocate, strangle, disfigure and inflict serious physical injury upon Flora Castells." On June 17, 1988, Underwood was arrested by the Binghamton, New York Police Department in connection with a forcible rape.

C. Underwood's Enlistment In The Marines.

On June 4, 1990, Underwood enlisted in the United States Marine Corps. On his enlistment application, Underwood disclosed that he had been arrested for rape in 1988. As a result, Underwood entered the United States Marine Corps on a waiver due to a previous arrest for rape. The United States Marine Corps allowed Underwood to enter on a waiver despite the restriction that the following characteristics are not waivable: questionable moral character, drug dependence, sexual perversion, and history of anti-social behavior.

D. Underwood's Other Sexual Assaults After Enlistment In The Marines.

On June 20, 1991, Tammi Watson accused Underwood of rape by force. On June 20, 1991, the Naval Investigative Service on the Marine Corps Base in Twenty-Nine Palms, California was notified of the alleged rape by force of Tammi Watson committed by Underwood. On July 1, 1991, the charge of forcible rape was filed against Underwood by the Morongo Basin District Attorneys' Office. On August 2, 1991, prior to the murder of Plaintiff's decedent, Underwood pressed a knife up against the throat of Deborah Ann Ashworth, when she refused to kiss Underwood.

E. The August 2, 1991 Murder Of Plaintiff's Decedent, Amanda Lee Scott.

On August 2, 1991, Underwood was dismissed for the day because he had a basketball game at the Norton Air Force Base in San Bernardino, California. On August 2, 1991, Underwood was scheduled to meet with Lance Corporal Perry Bernard Osbey, a United States Marine, and Staff Sergeant Larry George Isom, the coach of the Twenty-Nine Palms Marine basketball team, at the lower gym on the Twenty-Nine Palms Marine Base at 9:20 a.m. in order to drive together to the basketball game in San Bernardino. Sergeant Isom instructed all of the basketball players to meet at the west gym on Twenty-Nine Palms Marine Base at 9:30 a.m. on August 2, 1991. Lance Corporal Osbey believed that Underwood was not present at the lower west gym at 9:30 a.m. on August 2, 1991 because he was with two girls at their apartment. (This later proved to be the murder scene and the two girls were the Plaintiff's decedent and Rosalie Ortega.) On August 2, 1991 at approximately 9:45 a.m., when Underwood failed to appear at the lower gym on Twenty-Nine Palms Marine Base, Lance Corporal Osbey and Sergeant Isom initially intended to retrieve Underwood from the girls' apartment, however, when Sergeant Isom became angry at Underwood for being late they elected to depart for the basketball game without Underwood. Underwood later showed up at the tournament, and soon it was discovered that at the time he was to have met Sergeant Isom and Lance Corporal Osbey and the other members of the team, Underwood was murdering Ortega and Scott at the apartment where he told Lance Corporal Osbey he was going.

F. Murder Convictions.

Underwood's semen was found in both murder victims. *Post mortem* examinations of the two murder victims revealed that Underwood had stabbed each thirty-three times. Underwood wore number thirty-three on his basketball jersey. On March 6, 1998, Underwood was sentenced to two consecutive life terms without the possibility of parole, with an additional sixteen-month enhancement for the use of a deadly weapon, for the first-degree murders of Plaintiff's decedent, Amanda Lee Scott and Rosalie Ortega.

G. McMasters Files Suit In The District Court For The Central District Of California.

On July 30, 1993, the Plaintiff served upon the Judge Advocate General of the Navy her notice of claim in connection with the brutal rape and murder of her fifteen year-old daughter Amanda Lee Scott by United States Marine Valentine Underwood. The Judge Advocate General's Office denied the Plaintiff's claim. On February 28, 1995, the Plaintiff timely filed her original complaint with the United States District Court for the Central District of California, invoking the Court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and the FTCA, 28 U.S.C. §§ 2671, *et seq*. On July 30, 1995, the Plaintiff served the United States Marine Corps by hand delivering a copy of the summons and complaint to the Marine Corps Air and Ground Combat Center in Twenty-Nine Palms, California. In June 1996, the Plaintiff sent a copy of the summons and complaint via certified mail to the Attorney General of the United States. In addition, in June 1996 the Plaintiff sent by certified mail copies of the summons and complaint to the Commandant of the Marine Corps and the Department of the Navy. At the time, McMasters did not serve the United States Attorney for the district in which the action was brought.

H. The Central District Of California's Ruling On Service Of Process.

On August 18, 1998, after briefing by the parties, the Honorable Judge Timlin for the Central District of California made the following ruling on the service of process:

> The Court will, however, deem the U.S. Attorney's Office as served because McMasters, representing herself pro se, has "substantially complied" with Fed.R.Civ.Proc. Rule 4 and it is clear that the U.S. Attorney's Office by its response to the instant motion has actual notice of the complaint against its clients, the United States of America and the Department of the Navy. McMasters contends that she has a justifiable excuse for the failure to serve properly in that she received erroneous information regarding the service of process. Further, the defendants have not shown any prejudice from the defect in the service of the summons and complaint, whereas plaintiff would be severely prejudiced by the loss of her claim if the court were to construe Rule 4 in a rigid manner in this case. *See Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984) ("the provisions of Rule 4 should be given a liberal and flexible construction.").

I. The Case Is Transferred To The Northern District Of Illinois.

On August 24, 1998, the Plaintiff, appearing in *propria persona*, and pursuant to 28 U.S.C. § 1404(a), moved the Court for an order transferring her case from the United States District Court for the Central District of California to the

United States District Court for the Northern District of Illinois. On September 11, 1998, the Defendant filed its Notice of Nonopposition to Plaintiff's Motion for Change of Venue. On October 7, 1998, the Central District of California granted Plaintiff's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a).

J. The Proceedings Before The District Court For The Northern District Of Illinois.

On October 29, 1998, the Plaintiff filed her First Amended Complaint in the Northern District of Illinois. On November 30, 1998, the Defendants filed their Answer to the Plaintiff's First Amended Complaint. On March 10, 1999, the Government filed its Motion for Judgment on the Pleadings or Alternatively for Summary Judgment. On March 10, 1999, the Plaintiff filed her Motion for Summary Judgment.

On March 28, 2000, the District Court granted the Government's Motion for Judgment on the Pleadings, finding that service of process was insufficient because McMasters failed to serve the United States Attorney in the Central District of California. Pet. App. 20a. In making its ruling, the District Court recognized that it is generally bound by the law of the case doctrine to not upset prior decisions made by a coordinate court. *Id.* at 21a. However, the District Court concluded since "the initial decision was clearly erroneous and would work a manifest injustice" the Court would depart from that decision. *Id.* at 22a.

On April 6, 2000, the Plaintiff filed her Motion for Reconsideration asking the District Court to alter or amend the judgment on the pleadings entered in favor of the

Government and against the Plaintiff. The Plaintiff argued that because the case was transferred for the convenience of the litigants pursuant to 28 U.S.C. § 1404(a), the law of the transferor jurisdiction continued to apply. Accordingly, the District Court review of the pre-transfer ruling on service was required to apply Ninth Circuit precedent — the law of the transferor jurisdiction — not Seventh Circuit precedent. Additionally, the Plaintiff argued that the law of the case doctrine precluded the District Court from reviewing the pre-transfer order on service entered by the District Court for the Central District of California because the ruling on service was not clearly erroneous, it was properly decided based upon Ninth Circuit caselaw and precedent.

On June 6, 2000, the District Court denied the Plaintiff's Motion for Reconsideration. The District Court concluded it was not erroneous to rely on Seventh Circuit caselaw and precedent in evaluating the District Court for the Central District of California's pre-transfer order on service. Pet. App. 13a.

K. The Seventh Circuit Affirms.

On August 2, 2000, the Plaintiff filed her Notice of Appeal, appealing the District Court's denial of Plaintiff's Motion to Reconsider the District Court's prior decision to grant the Government's Motion for Judgment on the Pleadings. The Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. On August 14, 2001, the Court of Appeals for the Seventh Circuit affirmed. It found that the "District Court properly applied Seventh Circuit precedent in evaluating whether McMasters' case should be dismissed for failure to serve the United States Attorney." Pet. App. 10a.

On September 28, 2001, the Plaintiff filed her petition for rehearing and petition for rehearing *en banc* with the Seventh Circuit Court of Appeals. On November 2, 2001, the Court of Appeals for the Seventh Circuit denied the Plaintiff's request for rehearing and rehearing *en banc*. Pet. App. 29a.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Supreme Court has not, but should, decide whether the *Van Dusen* rule — that the law of the transferor court continues to apply after a transfer within the federal system — applies to federal law claims in the same manner as it currently applies to diversity claims. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1989).

Second, the Seventh Circuit's decision — that the law of the transferee court applies when deciding federal questions — is the Circuit's first ruling with broad application to all federal question transfers. *See Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993) (The Seventh Circuit concluded that the law of the transferor court should apply after a transfer, but limited its ruling to situations in which the law of the United States is intended to be geographically non-uniform.) Where the *Eckstein* decision was in accord with the Tenth Circuit's decision in *Olcott v. Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996), the Seventh Circuit's decision in the case at bar now creates a conflict between the Circuits. Additionally, the Seventh Circuit's decision conflicts with the D.C. Circuit's ruling in *In Re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) (Ruth B. Ginsburg, J.), *aff'd on*

other grounds sub nom., *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). More importantly, the Seventh Circuit's decision conflicts with the Supreme Court's reasoning in *Van Dusen* and *Ferens*.

Without a single rule from the Supreme Court on this issue, the Circuits will continue to create limited exceptions resulting in inconsistent decisions not appropriate for universal application. Accordingly, the Supreme Court should resolve the conflicts among the Circuits and settle this important question of federal law.

I. The Supreme Court Should Decide If The *Van Dusen* Rule Applies To Transferred Federal Law Claims.

In *Van Dusen*, this Court established the following rule:

> We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms. 376 U.S. at 639.

The Supreme Court addressed the *Van Dusen* rule in *Ferens v. John Deere Co.*, 494 U.S. 516, when the Court was asked to decide whether the *Van Dusen* rule applied where the plaintiffs sought the § 1404(a) transfer rather than the defendants. The Supreme Court, relying on its decision in *Van Dusen*, expanded the *Van Dusen* rule to apply regardless of which party sought the transfer of venue. *Ferens*, 494 U.S. at 523. However, despite the fact that in *Ferens* this Court stated, "[f]oresight and judicial economy now seem to favor

the single rule that the law does not change following a transfer of venue under § 1404(a)," the Court again limited it ruling to diversity cases. *Id.* at 530. To date, the Supreme Court has not addressed the question of weather the *Van Dusen* rule applies to transferred federal law claims.

Writing for the District of Columbia Circuit, Justice Ruth B. Ginsburg acknowledged the importance of this issue:

> The question before us is whether the *Van Dusen* rule — that the law applicable in the transferor forum attends the transfer — should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue, nor has the Supreme Court addressed it. *In Re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (Ruth B. Ginsburg, J.), *aff'd on other grounds sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

Once again, the Supreme Court is presented with the opportunity to address the issue that Justice Ginsburg considered a question "meriting attention from Higher Authority."

A. The Seventh Circuit's Opinion Conflicts With The Intended Purpose Of A Change Of Venue Under § 1404(a).

The intended purpose of a change of venue under § 1404(a) is to permit a transfer within the federal system for the convenience of the parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Clearly, the District Court for the Central District of California transferred this matter to the District Court for the Northern District of Illinois to effectuate the very purpose of § 1404(a) — for the convenience of the then *pro se* Plaintiff who was attempting to litigate a case pending in California from her residence in Illinois.

There is no ambiguity that as originally filed, the law of the Ninth Circuit governed this case. However, under the Seventh Circuit's decision, once transferred the case was governed by the law of the Seventh Circuit. This change in governing law resulted in the Plaintiff's case being dismissed with prejudice. The Seventh Circuit's decision simply cannot be reconciled with the Supreme Court's decisions in *Van Dusen* and *Ferens*, and the intended purpose of § 1404(a).

In support of the holdings in *Van Dusen* and *Ferens*, the Supreme Court stated:

> This legislative background supports the view that § 1404(a) was not designed to narrow the

> plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconvenience that flowed from the venue statutes by permitting transfer to a convenient federal court. . . . The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might get a change of law as a bonus for a change of venue. Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a).

Van Dusen, 376 U.S. at 639; *Ferens*, 494 U.S. at 522. The Supreme Court further reasoned that "[t]he decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law." *Ferens*, 494 U.S. at 523.

Not only does the Seventh Circuit's decision grant the Defendant a change of law as a bonus for the change of venue, the Seventh Circuit also granted the Defendant a review of the pre-transfer order on service under post-transfer law. The principle that a transferee court may review a pre-transfer order under post-transfer law defies logic. If the Central District of California's decision on service was proper prior to the § 1404(a) transfer, what about the transfer made it erroneous? More specifically to the case at bar, how can a case be dismissed with prejudice as a result of a § 1404(a) transfer? Not only is this conclusion insupportable, it runs completely afoul of the very purpose of a § 1404(a) transfer — to support the interests of justice. No Plaintiff would transfer her case for convenience purposes only to have it

dismissed with prejudice. This Court acknowledged that the purpose of § 1404(a) is to avoid the problem that the Seventh Circuit's decision created:

> The text of § 1404(a) may not say anything about choice of law, but we think it is not the purpose of the section to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper. The section exists to eliminate inconvenience without altering permissible choices under the venue statute. *Ferens*, 494 U.S. at 525.

Accordingly, the Seventh Circuit's Opinion conflicts with the intended purpose of a change of venue under § 1404(a).

B. The Seventh Circuit's Opinion Condones And Supports Forum Shopping.

In *Van Dusen* and *Ferens*, this Court raised concerns that in permitting a change of law as a result of a change of venue would transform § 1404(a) into a forum-shopping instrument. In *Van Dusen* the Supreme Court stated:

> If a change of law were in the offering, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum. 376 U.S. at 636.

In *Ferens*, the Supreme Court emphasized that the *Van Dusen* policy against forum shopping required that the

Court "not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue." *Ferens*, 494 U.S. at 527. The Seventh Circuit's opinion violates the *Van Dusen* policy against forum shopping.

The Seventh Circuit's decision stands for the proposition that a pre-transfer order can be reviewed after a § 1404(a) transfer under the transferee court's more favorable law. Accordingly, applying the Seventh Circuit's decision a party can obtain a unfavorable ruling, move pursuant to § 1404(a) for a transfer to a forum where a more favorable precedent governs, have the transferee court review the pre-transfer order under the more favorable law, and the end result is that the pre-transfer order is reversed by the transferee court. In the case at bar, the District Court for the Northern District of Illinois dismissed the Plaintiff's case with prejudice when it reversed the pre-transfer order on service made by the District Court for the Central District of California. The Seventh Circuit's decision therefore conflicts with the Supreme Court's decisions in *Van Dusen* and *Ferens*, which prohibit using § 1404(a) as a forum-shopping instrument.

C. The Seventh Circuit's Opinion Violates The Law Of The Case Doctrine.

The United States Supreme Court stated "[a]s most commonly defined the [law of the case] doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1982). The Supreme Court also stated "[a] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Id.* at 619. *See also*, *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992).

The law of the case doctrine applies not only to the previous decisions of the same court, but also to prior decisions of coordinate courts. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-16 (1987) ("Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts.") *Moore's Federal Practice* states this principle succinctly: "When a case is transferred from one district court to another any decisions rendered prior to the transfer are part of the record and become the law of the case." 18 *Moore's Federal Practice*, § 134.22[3][a] (Mathew Bender 3d Ed.). Upon receipt of the case at bar from the Central District of California, the District Court for the Northern District of Illinois reconsidered the pre-transfer order on service. The District Court for the Northern District of Illinois took this inappropriate action despite its acknowledgement of the importance of the law of the case doctrine "the Court is generally bound by the law of the case doctrine to not upset prior rulings in a case . . ." and the harsh result it would render upon the Plaintiff. Pet. App. 21a and 24a.

The District Court for the Northern District of Illinois wrote, and the Seventh Circuit agreed, that its departure from the law of the case doctrine was "[b]ecause the Court is convinced that the decision of the Central District of California regarding service of process was clearly erroneous and would work a manifest injustice. . . ." Pet. App. 22a. The pre-transfer order on service was neither clearly erroneous nor manifestly unjust, the order was proper when made, and is still valid under Ninth Circuit precedent. *See Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984). Indeed, there were no extraordinary circumstances present which would have warranted such action. The District Court and

the Seventh Circuit thus deviated from Supreme Court precedent:

> [A]s a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.

Christianson v. Colt, 486 U.S. at 817.

The Seventh Circuit concluded that the law of the case doctrine did not apply because the Central District of California's decision on service was clearly erroneous. The Seventh Circuit also concluded that Ninth Circuit precedent did not apply. Accordingly, the Seventh Circuit concluded that the Central District of California's pre-transfer order was clearly erroneous based upon Seventh Circuit precedent. This result is completely illogical.

At what point did the Central District of California's pre-transfer order become clearly erroneous? Obviously, it was not prior to the § 1404(a) transfer, because, among other things, the Central District of California relied upon and based its ruling squarely on Ninth Circuit precedent. *See Borzeka*, 739 F.2d at 447. According to the Seventh Circuit, only after the § 1404(a) transfer, when the District Court for the Northern District of Illinois reviewed the pre-transfer order under Seventh Circuit precedent, did the decision allegedly become clearly erroneous. In essence, the panel required the Central District of California to have predicted the transfer of the case to the Northern District of Illinois, and to have reviewed Seventh Circuit precedent in anticipation thereof.

In order for the exception to the law of the case doctrine to apply, the decision made by the Central District of California had to be clearly erroneous under Ninth Circuit precedent. The Seventh Circuit's decision to the contrary is completely inaccurate and would work a manifest injustice. The Seventh Circuit's decision stands for the proposition that a transfer under § 1404(a) allows the transferee court to review all of the orders entered by the transferor court under a new body of law. Obviously, this decision is contrary to the very purpose of 28 U.S.C. § 1404(a), and the purpose of the law of the case doctrine. The Seventh Circuit's decision does not support the interests of justice, misapprehends the purpose of a § 1404(a) transfer, and violates the law of the case doctrine.

II. Certiorari Is Warranted Because The Seventh Circuit's Decision Conflicts With Decisions Of This Court And Of Other Circuits.

Although this Court has not decided if the *Van Dusen* rule applies to transferred federal claims, the Seventh Circuit's decision conflicts with the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes "but a change of courtrooms." *Van Dusen*, 376 U.S. at 637; *Ferens*, 494 U.S. at 522. Indeed, the Seventh Circuit in *Eckstein v. Balcor Film Investors*, acknowledged this very point:

> When the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes "but a change

of courtrooms." *Van Dusen*, 376 U.S. at 637. 8 F.3d 1121, 1127 (7th Cir. 1993).

However, in accordance with the Seventh Circuit's decision, *Eckstein* stands for the proposition that "[o]n a limited number of federal issues, a court may be required to apply the law of a different circuit to cases which have been transferred under § 1404(a). . . ." Pet. App. 9a. More specifically, the Seventh Circuit concluded that *Eckstein* applies only when the law of the United States is specifically intended to be geographically non-uniform, and only then should the transferee court use the law of the transferor's forum. Pet. App. 10a; *see also Eckstein*, 8 F.3d at 1127. A ruling on this issue by the Supreme Court will stop the Circuits from continuing to draft specific exceptions regarding the application of the *Van Dusen* rule to transferred federal claims.

The failure of having a national rule regarding the application of the *Van Dusen* rule to transferred federal claims has created conflict among the Circuits. Indeed, the Tenth Circuit in *Olcott v. Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996) interpreted *Eckstein* to stand for the proposition that the *Van Dusen* rule applied to all transferred federal question cases. The question presented to the Tenth Circuit in *Olcott* was the same question addressed and answered by the Seventh Circuit in *Eckstein*, and the Second Circuit in *Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993): "should the rule the transferor forum law applies be extended to the federal question case?" *Olcott*, 76 F.3d at 1545. Similar to the Seventh Circuit in *Eckstein*, the Tenth Circuit rejected the Second Circuit's ruling in *Menowitz*, and agreed with the Seventh Circuit that "it makes no sense for the applicable law to change simply as a result of a motion to transfer."

Id. at 1546. *See also, International Marketing v. Archer-Daniels-Midland*, 192 F.3d 724, 729 (7th Cir. 1999):

> The situation is slightly more complicated when a case has been transferred from one federal district to another under § 1404(a). In that circumstance we have held that the transfer leaves the law, including choice-of-law rules, unaffected. *Citing, Eckstein.*

Clearly, the Seventh Circuit's decision in the case at bar would suggest that the Tenth Circuit's interpretation of *Eckstein* was too broad. However, the Seventh Circuit's decision in *Eckstein* and the Tenth Circuit's decision in *Olcott* were in accord prior to the Seventh Circuit's decision in the case at bar. *See Eckstein*, 8 F.3d at 1127; *Olcott*, 76 F.3d at 1546. Additionally, prior to the Seventh Circuit's decision, there was a circuit conflict between the Seventh Circuit's decision in *Eckstein* and the Second Circuit's decision in *Menowitz*. *See Eckstein*, 8 F.3d at 1127; and *Menowitz*, 991 F.3d at 41. However, now the Seventh Circuit's decision in the case at bar is in accord with the Second Circuit's decision in *Menowitz*, but is in conflict with the Tenth Circuit's decision in *Olcott*. This conflict between the Circuits will be eliminated once the Supreme Court rules on the application of the *Van Dusen* rule to transferred federal law claims.

The Seventh Circuit's decision also incorrectly relied on the D.C. Circuit's decision in *In Re Korean Airlines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987). The Court in *Korean Airlines* specifically stated "we deal here not with an all-purpose transfer under 28 U.S.C § 1404(a), but with a transfer under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings." *Id.* at 1176. As noted,

§ 1404(a) transfer are made for the convenience of the litigants, whereas, § 1407 consolidations are made for the efficient judicial management of complex, often multi-district class actions or mass disaster litigation. Indeed, following a § 1407 consolidation, the interests of judicial efficiency may support the application of the law of the transferee jurisdiction, as the Court found in *Korean Airlines*. 829 F.2d at 1176. Clearly, in instances were cases are transferred from multiple districts for consolidation of pretrial proceedings, the transferee court simply cannot be burdened with the onerous task of applying the law of each of the transferor courts — which may have multiple interpretations of the law. This would violate the purpose of a § 1407 transfer. However, there are no such efficiency interests to be served following a § 1404(a) transfer, since such transfers are done solely for the convenience of the litigants, and there is no provision in § 1404(a) to transfer the case back to the transferor court for trial as is provided in the provisions of § 1407. The distinctions between a § 1404(a) transfer and a § 1407 transfer are significant, but ignored by the Seventh Circuit's decision.

The Seventh Circuit's decision is also in conflict with the D.C. Circuit's decision in connection with the issue of the law of the case doctrine. Justice Ginsburg, writing for the D.C. Circuit in *Korean Airlines*, concluded that the law of the case doctrine would require the transferor courts to accept any rulings made by the transferee court, which were decided under the transferee court's law, stating:

> Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to the transferor courts outside this circuit, would our district court's Warsaw Convention/

> Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.*, capable of generating rather than reducing the duplication and protraction Congress sought to check. 829 F.2d at 1176.

In summary, the D.C. Circuit concluded in *Korean Airlines* that after a § 1407 transfer for consolidation of pretrial proceedings the law of the transferee court applies to all federal law questions, and thus the *Van Dusen* rule does not apply to transferred federal claims. Should the cases then go back to the transferor courts for trial — as provided for in § 1407 — any decisions made by the transferee court would be binding under the law of the case doctrine. However, any decisions thereafter are made in accordance with the law of the transferor's court. *Korean Airlines*, 829 F.2d at 1176. The Seventh Circuit's decision disregarded the law of the case doctrine and reviewed a pre-transfer order, made by the District Court for the Central District of California under Ninth Circuit precedent, under Seventh Circuit's law — the transferee court's law. The Seventh Circuit's decision conflicts with the D.C. Circuit's decision.

This Court could conclude that in accordance with the D.C. Circuit's ruling in *Korean Airlines*, the Seventh Circuit was correct in concluding that the *Van Dusen* rule does not apply to transferred federal claims — after a transfer the transferee court should apply its own precedent to federal law questions. However, the Seventh Circuit erred in reviewing the pre-transfer order on service, because the pre-transfer order on service, which was made under valid Ninth Circuit precedent, was the law of the case. Such a ruling

would be in accord with the D.C. Circuit's ruling in *Korean Airlines*. However, at present there is a circuit conflict between the Seventh Circuit and the D.C. Circuit. Accordingly, certiorari is warranted because the Seventh Circuit's decision conflicts with decisions of other Circuits as well as decisions of the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED AUGUST 14, 2001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2991

DEBRA McMASTERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA and
THE DEPARTMENT OF THE NAVY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 6413 — **Charles P. Kocoras**, *Judge.*

ARGUED FEBRUARY 26, 2001 —
DECIDED AUGUST 14, 2001

Before BAUER, POSNER, and KANNE, *Circuit Judges.*

Appendix A

KANNE, *Circuit Judge.* On August 2, 1991, fifteen year-old Amanda Lee Scott was raped and murdered by then-United States Marine Valentine Underwood.[1] On February 28, 1995, Scott's mother, plaintiff-appellant Debra McMasters, filed suit against the United States and the Department of the Navy in the United States District Court for the Central District of California seeking damages under state law as well as under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b).[2] McMasters, proceeding *pro se*, delivered a copy of the summons and complaint to the U.S. Marine Corps' Air and Ground Center in Twenty-Nine Palms, California, on July 30, 1995. Approximately a year later, McMasters sent a copy of the summons and complaint via certified mail to the Attorney General of the United States. At that time, McMasters also sent copies of the summons and complaint to the Commandant of the Marine Corps and the Department of the Navy.

Three years later, McMasters filed a motion for default judgment based on the fact that the government had not responded to her complaint. The government opposed McMasters' motion, asserting that it did not have notice of the action until McMasters filed the motion for default

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1. Valentine was convicted of Amanda Lee Scott's murder as well as the murder of twenty year-old Rosalie Ortega in California State Court on December 19, 1997. He is currently serving two consecutive life sentences in state prison.

2. McMasters' suit was based on the fact that the Marines issued a waiver allowing Underwood to enlist in the Corps despite two previous arrests for rape and also upon the fact that Underwood was under investigation for a third rape at the time that Amanda Lee Scott was murdered.

judgment because McMasters failed to serve the United States Attorney for the Central District of California. The district court denied McMasters' motion for default judgment but determined that service was proper:

> The Court will, however, deem the U.S. Attorney's Office as served because McMasters, representing herself pro se, has "substantially complied" with Fed. R. Civ. Proc. Rule 4 and it is clear that the U.S. Attorney's Office by its response to the instant motion has actual notice of the complaint against its clients, the United States of America and the Department of the Navy. McMasters contends that she has a justifiable excuse for the failure to serve properly in that she received erroneous information regarding the service of process. Further, the defendants have not shown any prejudice from the defect in the service of the summons and complaint, whereas plaintiff would be severely prejudiced by the loss of her claim if the court were to construe Rule 4 in a rigid manner in this case.

McMasters v. United States, No. 00-2991 (C.D. Cal. Aug. 8, 1998) (order denying plaintiff's motion for default judgment and ordering defendants to file a responsive pleading).

On August 24, 1998, McMasters moved to transfer the case from the Central District of California to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). The government did not oppose the transfer, and the district court granted the motion. McMasters, now represented by counsel, filed an amended complaint in the Northern District of Illinois

alleging that, as her daughter's next-of-kin, she was entitled to relief under the FTCA because the Marine Corps negligently recruited, enlisted, supervised, and retained Underwood. In its answer, the government presented several defenses including insufficient service of process. The government filed a motion for judgment on the pleadings, or alternatively for summary judgment, arguing that the case should be dismissed for insufficient service of process, or alternatively, because plaintiff's claims were barred by the FTCA's assault and battery exception, 28 U.S.C. § 2680(h), and the discretionary function exception, 28 U.S.C. § 2680(a). McMasters filed a cross-motion for summary judgment.

On March 28, 2000, the district court granted the government's motion for judgment on the pleadings, finding that service of process was insufficient because McMasters failed to serve the United States Attorney.[3] In making this determination, the court recognized that a court is generally bound by decisions made by a coordinate court but found that the determination of the district court for the Central District of California regarding service of process was "clearly erroneous and would work a manifest injustice" if allowed to stand. *McMasters v. United States*, No. 98 C 6413, 2000 WL 336549, at *4 (N.D. Ill. March 28, 2000). McMasters filed a motion for reconsideration and the district court denied the motion. She now appeals. We review the district court's order granting the motion for judgment on the pleadings *de novo*, drawing all inferences in the light most favorable to McMasters. *See Velasco v. Ill. Dep't. of Human Servs.*, 246 F.3d 1010, 1016 (7th Cir. 2000).

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3. McMasters is precluded from refiling her claim because the statute of limitations has run.

Appendix A

The plain language of Rule 4(i) of the Federal Rules of Civil Procedure requires that, in order to properly serve the United States or its agencies, corporations, or officers, a plaintiff must deliver a copy of the summons and the complaint to the U.S. Attorney's Office for the district in which the action is brought, as well as to the Attorney General of the United States.[4] While a court must give a plaintiff reasonable time to cure a defect in service under Rule 4(i)(3)[5]

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4. Rule 4(i)(1) provides that service on the United States may be effected:

> (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney and
>
> (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States . . . .

FED. R. CIV. P. 4(i)(1).

5. Rule 4(i)(3) provides in relevant part:

> The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:
>
> (A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States . . . .

FED. R. CIV. P. 4(i)(3).

or grant an appropriate extension of time for service under Rule 4(m),[6] nothing in the Federal Rules of Civil Procedure allows a judge to excuse service altogether. Actual notice to the defendant is insufficient; the plaintiff must comply with the directives of Rule 4. *See Mid-Continent Wood Prod., Inc. v. Harris*, 936 F.2d 297, 301-02 (7th Cir. 1991) (stating that neither actual notice nor substantial compliance is sufficient to satisfy the requirements of Rule 4); *see also Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir. 1994) (upholding dismissal where plaintiff served U.S. Attorney by mail because, at that time, Rule 4(d)(4) required personal service on the U.S. Attorney).

Although McMasters mailed a copy of the summons and complaint to the Attorney General in accordance with Rule 4(i)(1)(B), at no point did she ever serve the U.S. Attorney. This failure renders improper the service of the United States. *See Tuke v. United States*, 76 F.3d 155, 157 (7th Cir. 1996) (stating that a plaintiff must comply with both prongs of 4(i)(1) "for good reason: that's what the rule says"). The fact that McMasters was proceeding *pro se* does not excuse her failure to comply with procedural rules. *See, e.g., McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.") (footnote omitted). Thus, we are in agreement with the district court's conclusion that, "the

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6. Under Rule 4(m), a plaintiff who has failed to effect service within the required 120 day period will be granted an extension "for service for an appropriate period" upon a showing of good cause. FED. R. CIV. P. 4(m).

Central District of California may have been within its discretion in permitting McMasters' service on the Attorney General nearly 15 months after the filing of her complaint, but clearly erred in excusing McMasters from ever having served or having to serve the U.S. Attorney." *McMasters v. United States*, 2000 WL 336549, at *4. Although this may seem overly formalistic, "[t]he Supreme Court insists that federal judges carry out the rules of procedure, whether or not those rules strike the judges as optimal." *Tuke*, 76 F.3d at 157.

McMasters argues that even if service was improper, the district court erred in revisiting the decision of the Central District of California. She contends that the law of the case doctrine precluded the district judge in the Northern District of Illinois from reviewing the pre-transfer decision of the district judge in the Central District of California that service was proper. McMasters is correct that the law of the case doctrine, which provides that courts should refrain from reopening issues decided in earlier stages of the same litigation, *see Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988), applies when a case is transferred from one district court to another. *See id.* at 816. ("[T]he [law of the case] doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions."). However, as the district court correctly recognized, "[t]he doctrine does not apply if the court is 'convinced that [the prior decision] is clearly erroneous and would work a manifest injustice.' " *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)).

Appendix A

Whether the second district judge correctly overruled the decision of the first district judge is of no moment on appeal, however, when we are faced with an issue of law. Notwithstanding plaintiff's assertions to the contrary, the law of the case doctrine does not prevent either party from seeking review of an erroneous decision by a district court. On appeal, "the question is not whether the second judge should have deferred to the ruling of the first judge, but whether that ruling was correct." *Williams v. Comm'r of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993); *see also Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980) ("[O]bviously we cannot be expected to reverse a correct decision by one district judge simply because we find it is contrary to a prior ruling by another district judge in the same case.") (internal quotation omitted). As we indicated above, the district court correctly found that McMasters failed to properly serve the United States; therefore, plaintiff's first argument fails.

Next, McMasters contends that service was proper under Ninth Circuit precedent and that the district judge in the Northern District of Illinois should have applied that law when evaluating whether service was proper. McMasters relies on *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984), to support her contention that the district judge in the Central District of California properly concluded that service had been effected on the United States. In *Borzeka*, the plaintiff attempted to serve the U.S. Attorney by sending the summons and complaint by certified mail rather than personally serving the U.S. Attorney as required at that time by Rule 4(d)(5) of the Federal Rules of Civil Procedure. *See id.* In reversing the district court's dismissal, the Ninth Circuit held that failure to comply with the personal service requirement of

Rule 4(d)(5) did not require dismissal if: "(a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed." *Id.* at 447 (footnote omitted).

We are not convinced that McMasters' service of the United States was proper even under the test articulated in *Borzeka*; however, we need not consider that issue because McMasters' assertion that Ninth Circuit precedent applies in this case is incorrect. Although the law of the transferor court continues to apply when a diversity case is transferred from one district court to another under § 1404(a), *see Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964), the transferee court is usually "free to decide [federal issues] in the manner it views as correct without deferring to the interpretation of the transferor circuit," *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (Ruth B. Ginsburg, J.) (internal quotation omitted), *aff'd. on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989). On a limited number of federal issues, a court may be required to apply the law of a different circuit to cases which have been transferred under § 1404(a), *see Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126-27 (7th Cir. 1993), but the general rule is that "[a] single federal law implies a national interpretation . . . . [T]he norm is that each court of appeals considers the question independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Id.* at 1126; *see also In re Korean Air Lines Disaster*, 829 F.2d at 1175.("[B]ecause there is ultimately a single proper

interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory."). Although "Congress might require one federal court to apply another's interpretation of federal law . . . § 1404(a) does not itself do so." *Eckstein*, 8 F.3d at 1126. Only where the law of the United States is specifically intended to be geographically non-uniform should the transferee court apply the circuit precedent of the transferor court. *See id.* ("Section 27A [of the Securities Exchange Act of 1934] recognizes that different circuits had taken different approaches to the appropriate statute of limitations in suits under § 10(b), and it codifies this fractured nature of federal law . . . ."). *But see Menowitz v. Brown*, 991 F.2d 36, 40-41 (2d Cir. 1993) (finding that a transferee court should always apply the law of its circuit and ignore the law of the transferor circuit under § 27A). Unlike the statute at issue in *Eckstein*, the Federal Rules of Civil Procedure are not intended to be geographically non-uniform. Thus, the district court properly applied Seventh Circuit precedent in evaluating whether McMasters' case should be dismissed for failure to serve the United States Attorney.

For the foregoing reasons, we find that the district court properly dismissed McMasters' complaint for failure to effect proper service on the United States. The decision of the district court is AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 6, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

98 C 6413

DEBRA McMASTERS, individually and as next-of-kin of decedent, AMANDA LEE SCOTT, a minor,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and the DEPARTMENT OF THE NAVY,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on Plaintiff's motion to reconsider this Court's prior decision to grant Defendants' motion for judgment on the pleadings. For the reasons set forth below, the Court denies Plaintiff's motion to reconsider.

Appendix B

LEGAL STANDARD

Rule 59(e) permits parties to file, within ten days of the entry of a judgment, a motion to alter or amend the judgment. It maybe invoked to alert the court to matters such as newly discovered evidence or manifest errors of law or fact. *See In the Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996), *cert. denied sub nom Prince v. Unsecured Creditors Committee*, 519 U. S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996); *Russel v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). However, the Rule does not give a party the opportunity to undo its own procedural failures or present new evidence or arguments "that could and should have been presented to the district court prior to judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876, (7th Cir. 1996), *citing LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). To be successful, a Rule 59(e) motion "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *LB Credit Corp.*, 49 F.3d at 1267, *quoting FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986). The decision of whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d at 324, *citing LB Credit Corp.*, 49 F.3d at 1267. It is with these principles in mind that the Court considers the present motion.

DISCUSSION

The Court previously granted the motion of Defendants, the United States and the Department of the Navy, for judgment on the pleadings. *See McMasters v. United States*,

No. 98 C 6413, 2000 WL 336549 (N.D. Ill. Mar. 28, 2000). This Court determined that Plaintiff Debra McMasters' ("McMasters") failure to ever serve the U.S. Attorney was fatal to her case. In so doing, the Court sought guidance from Seventh Circuit caselaw and departed from an earlier ruling from the Central District of California. *See id.* at *3-4. Presently, McMasters moves the Court to reconsider its previous decision, arguing that the Court erred, not in its interpretation of Seventh Circuit caselaw, but in relying on Seventh Circuit caselaw rather than Ninth Circuit caselaw in analyzing the previous motion.

Because the Court finds that it was not erroneous to rely on Seventh Circuit caselaw and precedent in evaluating the Federal Rule of Civil Procedure service issues in Defendants' motion for judgment on the pleadings, the Court denies McMasters' motion to reconsider. "A single federal law implies a national interpretation. Although courts of appeals cannot achieve this on their own, the norm is that each court of appeals considers the question independently and reaches its own decision, without regard to the geographic location of the events giving rise to the litigation." *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126 (7th Cir. 1993); *see also In re Korean Air Lines Disaster*, 829 F.2d 1171, 1173 (D.C. Cir. 1987) (Ruth B. Ginsburg, J.), *affirmed on other grounds sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989) ("the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit").

McMasters cites to *Eckstein* in support of its argument that this Court should apply Ninth Circuit decisional law; however, McMasters misunderstands *Eckstein*. In *Eckstein*, the Seventh Circuit affirmed the decision in *Korean Airlines* that a transferee court should decide federal claims independently without guessing how the transferor court would reason. *See Eckstein*, 8 F.3d at 1126; *Mark v. Keycorp Mortgage Inc.*, 1996 WL 465400, at *6, n.4 (N.D. Ill. Aug. 8, 1996). *Eckstein*, however, drew a narrow exception for situations where the federal law to be applied is purposely not intended to be geographically uniform among the circuits. *See Eckstein*, 8 F.3d at 1126; *Mark*, 1996 WL 465600, at *6, n.4. Nevertheless, where federal law is supposed to be uniform, as with the Federal Rules of Civil Procedure, but is interpreted differently among the circuits, the law of the transferee court governs. *See Eckstein*, 8 F.3d at 1126-27; *Mark*, 1996 WL 465400, at * 6, n.4. In interpreting federal law, "Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit." *Korean Airlines*, 829 F.2d at 1176. Therefore, this Court did not err in analyzing the Federal Rule of Civil Procedure 4(i) service issues according to Seventh Circuit decisional law.

CONCLUSION

For the reasons set forth above, the Court denies Plaintiff's motion to reconsider.

s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: June 6, 2000

APPENDIX C — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 27, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

98 C 6413

DEBRA McMASTERS, individually and as next-of-kin of decedent, AMANDA LEE SCOTT, a minor,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and the DEPARTMENT OF THE NAVY,

Defendants.

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge.

This case comes before the court on defendant United States' ("the government") motion for judgment on the pleadings or in the alternative for summary judgment and plaintiff Debra McMasters' ("McMasters") motion for summary judgment. For the reasons set forth below, the Court grants the government's motion and denies McMasters' motion in its entirety.

Appendix C

BACKGROUND

Valentine Underwood ("Underwood"), although not a party to this case, is the central figure in this tragic story. Underwood enlisted in the Marine Corps in Maryland in 1990. On his enlistment application, he disclosed that he had been arrested for rape in 1988 in New York. Further investigation revealed that Underwood had also been arrested in Maryland in 1987 for the same offense. Neither arrest resulted in a conviction. On the section of the application relating to drug use, Underwood stated, falsely, that he had never used any kind of illegal drug. Despite Underwood's arrest record, the Marines issued a waiver that allowed Underwood to enlist in the Corps.

In the summer of 1991, Underwood was stationed at the Marine Corps base at 29 Palms, California. While stationed there, Underwood was once again investigated in connection with a reported rape. While the investigation was pending, Underwood regularly left the base. Both Underwood and his roommate, Perry Bernard Osbey ("Osbey") were both members of the base basketball team, coached by Sergeant Larry Isom ("Isom"). Osbey regularly socialized with Underwood, but Isom's interactions with Underwood were limited to two conversations in which the two had mostly discussed basketball. Early on the morning of August 2, 1991, Underwood went to his room on the base to try to convince Osbey to accompany him to an off-base apartment occupied by Rosalie Ortega, a 20-year-old, and plaintiff's decedent, Amanda Lee Scott, a 15-year-old. Osbey noted that Underwood's eyes were glassy and that Underwood was acting strangely. Osbey had heard rumors that Underwood had been using cocaine but

did not know if the rumors were true. Whether because of Underwood's strange behavior or because of the basketball tournament in which both Osbey and Underwood were to participate later that day, Osbey chose not to go to the apartment. When Underwood did not come to the designated gathering place for the basketball team to leave for the tournament, Isom asked Osbey if he knew where Underwood was, and Osbey told him that Underwood was at some girls' apartment off base and that Osbey had an idea where the apartment was. At first Isom decided to drive to get Underwood but later changed his mind because he was so angry with Underwood for being late. Underwood later showed up at the tournament, and soon it was discovered that at the time he was to have met Isom and Osbey and the other members of the team, Underwood was murdering Ortega and Scott at the apartment where he told Osbey he was going. Underwood was charged with the murders shortly thereafter and for the June rape on August 14, 1991. Medical examination of the victims found Underwood's sperm in both victims. A state court convicted Underwood of both murders in 1997, and he is serving two consecutive life sentences in California. After Underwood's conviction, McMasters filed the instant action seeking damages from the government and the Department of the Navy under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. §§ 2671 *et seq.* The case, originally filed in the Central District of California on February 28, 1995, was transferred to the Northern District of Illinois in 1998. The government has moved for judgment on the pleadings or, in the alternative, for summary judgment, and McMasters has moved for summary judgment.

Appendix C

LEGAL STANDARDS

After the close of pleadings, a defendant may, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, move for judgment on the pleadings to dispose of the case on the basis of the underlying substantive merits. The appropriate standard for a judgment on the pleadings is that applicable to summary judgment, except that the court may consider only the contents of the pleadings. *See Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993). Thus, all well-pleaded allegations are taken as true, and the facts and inferences to be drawn from those allegations are viewed in a light most favorable to the plaintiff. *See id.*

Summary judgment is appropriate when the record, viewed in a light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2458, 91 L.Ed.2d 265 (1986). The burden then shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *See id.* The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits. The nonmovant must go beyond the pleadings and support its contentions with proper documentary evidence. *See id.*

The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *See id.* at 323.

For cross-motions for summary judgment, each movant must individually fulfill the stringent requirements necessary to obtain summary judgment under Rule 56, such standards still being applicable. *See United Transportation Union v. Illinois Central R.R.*, 998 F. Supp. 874, 880 (N.D. Ill.1998). By filing cross-motions for summary judgment, the parties do not waive trial by the merits, but each party merely believes that the court should grant it judgment without trial, unless the judge disagrees. *See Miller v. LeSea Broadcasting, Inc.*, 87 F.3d 224, 230 (7th Cir. 1996). Indeed, upon receipt of cross-motions for summary judgment, the court is not required to grant summary judgment as a matter of law for either side. See *Brownlee v. City of Chicago*, 983 F. Supp. 776, 779 (N.D. Ill. 1997); *Boozell v. United States*, 979 F. Supp. 670, 674 (N.D. Ill. 1997). Rather, the court will evaluate each motion on its merits, resolving factual uncertainties and drawing all reasonable inferences against the movant. See *Brownlee*, 983 F. Supp. at 779; *Boozell*, 979 F. Supp. at 670; *United Transportation Union*, 998 F. Supp. at 880. With all these principles in mind, the Court evaluates the merits of the motions.

Appendix C

DISCUSSION

As a preliminary matter, the government argues that this case should be dismissed in its entirety because of various problems with McMasters' service of the U.S. Attorney, even though Judge Timlin of the Central District of California deemed the government served because McMasters had substantially complied with the requirements of service. Because the Court finds McMasters' complete failure to serve the U.S. Attorney fatal, the Court departs from the Central District of California's decision and dismisses this action against the United States.

McMasters filed her complaint against the United States and the Department of the Navy in the Central District of California on February 28, 1995. On, July 30, 1995, she served the United States Marine Corps by hand delivering a copy of the summons and complaint to the Marine Corps' Air and Ground Combat Center in Twenty-Nine Palms, California. In June 1996, over a year after filing her complaint, McMasters sent a copy of the summons and complaint via certified mail to the Attorney General of the United States. In addition, in June 1996, McMasters sent by certified mail copies of the summons and complaint to the Commandant of the Marine Corps and the Department of the Navy. McMasters did not and has never properly served the U.S. Attorney for the district in which the action was brought or any other U.S. Attorney.

After the district court issued repeated orders to McMasters to show cause why the action should not be dismissed for lack of diligent prosecution based on lack of

service, McMasters moved for default judgment on March 25, 1998 because the government had not responded to her complaint. The district court vacated this motion for default because McMasters had not requested an Entry of Default by the Clerk. Subsequently, McMasters filed another motion for default judgment on June 8, 1998. The government opposed this motion for default judgment, asserting that the U.S. Attorney was unaware of McMasters' action until the filing of the March 25, 1998 motion for default judgment because McMasters had never properly served the U.S. Attorney with a summons and complaint.

In a minute order, Judge Timlin denied the motion for default judgment, but "deem[ed] the U.S. Attorney's Office as served because McMasters, representing herself pro se, has 'substantially complied' with Fed.R.Civ.Proc. [sic] Rule 4 and it is clear that the U.S. Attorney's Office by its response to the instant motion has actual notice of the complaint against its clients, the United States of America and the Department of the 1Navy." *See McMasters v. U.S.*, No. 95-0064 (C.D.Ca. Aug. 18, 1998). Judge Timlin also noted that McMasters contended that she had a justifiable excuse for her failure to properly serve, which was that she received incorrect information regarding service of process. Finally, Judge Timlin found that the government had not shown any prejudice from the defective service, whereas he concluded McMasters would be severely prejudiced because she would lose her claim.

Although the Court is generally bound by the law of the case doctrine to not upset prior rulings in a case, it is not improper for a court to depart from a prior holding if it is

convinced that "the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Arizona v. California*, 460 U.S. 605, 619, n.8, 103 S.Ct. 1382, 1391, n.8, 75 L.Ed.2d 318 (1983). Because the Court is convinced that the decision of the Central District of California regarding service of process was clearly erroneous and would work a manifest injustice, the Court will depart from that decision.

Federal Rule of Civil Procedure 4(i) sets out the requirements for service upon the United States, and its agencies, corporations, or officers. *See* Fed.R.Civ.P. 4(i). It provides in relevant part:

> (1) Service upon the United States shall be effected
>
> (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and
>
> (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia . . . . Fed.R.Civ.P. 4(i)(1).

Further, Rule 4(m) allows 120 days for a plaintiff to serve the summons and the complaint and allows the Court to grant appropriate extensions. *See* Fed.R.Civ.P. 4(m). Rule 4(i)(3) also provides that a court should allow a reasonable time for a claimant to cure a failure to "serve multiple officers, agencies or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General for the United States." Fed.R.Civ.P. 4(i)(3).

Although McMasters mailed a copy of the summons and complaint via certified mail to the Attorney General pursuant to Rule 4(i)(1)(B), she failed to ever properly serve the U.S. Attorney in accordance with Rule 4(i)(1)(A). This failure of service is fatal to McMasters' claim. Although a court may grant an extension of time so as to approve service made outside the 120 day period provided in Rule 4(m) or cure a defect in serving multiple officers, agencies or corporations of the United States, a court may not simply condone a complete failure to serve. *Compare Tuke v. United States*, 76 F.3d 155, 156-57 (7th Cir. 1996) *with Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d 338, 340-41 (7th Cir. 1996). Thus, the Central District of California may have been within its discretion in permitting McMasters' service on the Attorney General nearly 15 months after the filing of her complaint, but clearly erred in excusing McMasters from ever having served or having to serve the U.S. Attorney.

In properly serving the United States, it is not sufficient to serve only the Attorney General. *See Tuke*, 76 F.3d at 156-57. Rather, a claimant must comply with both prongs of Rule 4(i)(1); "for good reason: that's what the rule says."

Id. at 157. Further, actual notice is insufficient to meet the requirements of Rule 4. *See, e.g., Swaim v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir. 1996); *Mid-Content Wood Products, Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir.1991) (liberal construction of rules of service "cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be held"). So, even if the U.S. Attorney did have actual notice of McMasters' complaint, it was inadequate to meet the requirements of Rule 4(i)(1)(A) and does not "deem" the U.S. Attorney served. Further, that McMasters was proceeding pro se does not excuse her from complying with the mandates of Rule 4. *See Clark v. Runyon*, 27 F. Supp.2d 1040, 1042 (N.D. Ill. 1998), *quoting McNeil v. United States*, 508 U.S. 106, 113, 113, S.Ct. 1980, 124 L.Ed.2d 21 (1993).

Thus, the Court dismisses McMasters' complaint for failure to properly serve the United States. Because the statute of limitations has run on her claim, the dismissal essentially becomes one with prejudice. *See Tuke*, 76 F.3d at 156. Although this seems like a harsh result, the United States Supreme Court has emphasized that federal judges should carry out the rules of procedure, regardless of whether those rules strike the judge as optimal. *See, e.g., Leatherman v. Tarrant County*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). This is because "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980).

Appendix C

McMasters claim also fails against the Department of the Navy because she improperly served it and because the Department of the Navy is not a proper defendant. Rule 4(i)(2) provides that "Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation." Fed.R.Civ.P. 4(i)(2). As discussed above, McMasters failed to serve the United States as prescribed in Rule 4(i), paragraph 1. This failure also renders her service on the Department of the Navy insufficient under Rule 4(i)(2). *See* Fed.R.Civ.P. 4(i)(2). Thus, the Court dismisses McMasters' claim against the Department of Navy.

In addition, the Department of the Navy must be dismissed from this suit because it is not a proper defendant. The United States is the only party that can be sued under the FTCA; individual agencies or departments are not proper parties to FTCA actions. *See, e.g., Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir. 1984); *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982). For this additional reason, the Department of the Navy is dismissed as a defendant.

Having already dismissed McMasters' complaint against the United States and the Department of the Navy, it is unnecessary for the Court to address McMasters' motion for summary judgment. The Court denies McMasters' motion for summary judgment as moot.

Appendix C

CONCLUSION

For the reasons set forth above, the Court grants the government's motion for judgment on the pleadings or in the alternative for summary judgment. The Court denies McMasters' motion for summary judgment in its entirety.

s/ Charles P. Kocoras
Charles P. Kocoras
United States District Court Judge

Dated: March 27, 2000

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 98 C 6413

Debra McMasters

v.

United States of America et al

JUDGMENT IN A CIVIL CASE

❑ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

❑ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment on the pleadings is entered in favor of the defendants and against plaintiff. Plaintiff to take nothing. All matters in controversy having been resolved, final judgment is hereby entered in favor of the defendants and against plaintiff.

Michael W. Dobbins, Clerk of Court

Date: 3/27/2000

s/ Stephen C. Tokoph
Stephen C. Tokoph, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 2, 2001

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

AMENDED: November 2, 2001
November 1, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 00-2991

DEBRA McMASTERS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and
THE DEPARTMENT OF THE NAVY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 98 C 6413

Charles P. Kocoras,
Judge.

Appendix D

ORDER

On consideration of the petition for rehearing and petition for rehearing ***en banc***, no judge in active service has requested a vote on the petition for rehearing *en banc*,* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

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* Chief Judge Flaum and Judge Ripple took no part in its consideration.